BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of ADVANCED TELECOM GROUP, INC., NEXTLINK WASHINGTON, INC., ELECTRIC LIGHTWAVE, INC., FRONTIER LOCAL SERVICES, INC., AND FRONTIER TELEMANAGEMENT, INC., for a Declaratory Order or Interpretive and Policy Statement on 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809	DOCKET NO. UT-990355 U S WEST'S STATEMENT OF FACT AND LAW

Pursuant to the Commission's Notice of June 29, 1999 U S WEST Communications, Inc., (U S WEST) hereby files the following statement of fact and law with regard to the relief requested in this petition.

Introduction

The joint petitioners have requested relief in two separate areas. First, the joint petitioners ask that the Commission issue a declaratory order or an interpretive and policy statement declaring that the language of Section 252(i) and FCC Rule 809 applies without condition except as set forth

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in the statute or the rule, and to essentially state that any CLEC has the right to "opt-into" any terms, conditions or provisions of any existing interconnection agreement.

Second, the joint petitioners ask that the Commission modify the provisions of WAC 480-09-530 to allow carriers with 252(i) issues to obtain even more expedited timelines than already set forth in the rule, and to allow requesting carriers to avoid some of the requirements of that rule.

For the reasons set forth herein, U S WEST is opposed to this petition. The Commission should not issue a declaratory order or an interpretive and policy statement because the petition does not support that type of relief. Nor should the Commission engage in a proceeding to modify or adopt rules unless the Commission follows the proper procedures for a rulemaking. In addition, from a substantive standpoint, the joint petitioners misinterpret the meaning of the FCC Rule and inappropriately ignore certain requirements around "opt-in" from the FCC's First Report and Order.

A Declaratory Ruling is Not Appropriate

A declaratory ruling is not appropriate in this matter, as there is no actual controversy necessitating resolution. An actual controversy necessitating resolution is a requirement for requesting a declaratory order under RCW 34.05.240.[1]

However, in this case, the joint petitioners have not described any actual controversy. The closest they can come to describing any sort of a controversy with U S WEST is the bare allegation in paragraph 4. of the petition that "U S WEST now represents to CLECs that it will honor such requests only under very limited circumstances that effectively eliminate any of the viable use" of the rule. This is simply incorrect. It is also such a vague and general allegation, that U S WEST is

[1] U S WEST does not consent to the use of a declaratory proceeding pursuant to the provisions of RCW 34.05.240(7). U S WEST would be prejudiced by the entry of a declaratory ruling as requested by the joint petitioners.

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unable to discern if the joint petitioners are referencing a particular dispute or not.

To the best of U S WEST's knowledge, none of the parties except Nextlink has a 252(i)-related dispute with U S WEST. Nextlink does, but Nextlink has chosen to pursue another avenue to address these issues by filing a petition for enforcement under WAC 480-09-530 in Docket No. UT-990340. Certainly Nextlink should not be permitted to litigate the same claim or issues in two separate dockets.

Finally, the joint petitioners attempt to suggest uncertainty or controversy by rearguing an issue that has already been decided by the Commission. They state, in paragraph 5 of the petition, that uncertainty exists because U S WEST has refused to include the actual provisions of Rule 809 in any interconnection agreement. However, the Commission has not required inclusion of Rule 809 language in any interconnection agreement, and has issued such a ruling as recently as several weeks ago in the Airtouch proceeding, Docket No. UT-990300. Here there is no uncertainty, just the joint petitioners' dissatisfaction with a term in their agreements. This is not a proper basis for a petition for a declaratory ruling.

An Interpretive and Policy Statement is Not Appropriate

An interpretive and policy statement is only appropriate to resolve an actual controversy or a substantial uncertainty (WAC 480-09-200). For the reasons set forth above regarding the appropriateness of a declaratory ruling, no such controversy exists between most of the parties, and Nextlink has already sought resolution of its dispute in a separate docket. Issuance of an interpretive and policy statement is therefore not appropriate.

Petitioners Have Not Followed Proper Procedures for a Rulemaking

Review of the petition reveals that the relief requested is a modification to an existing Commission rule (WAC 480-09-530) and adoption of new rules incorporating and/or interpreting

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the FCC rule. The petition is thus a petition for a rulemaking. However, it was not properly initiated under RCW 34.05.330 and WAC 480-09-220. If the issues raised in this petition are to be considered at all, they should be considered in a rulemaking, subject to the appropriate procedural requirements and with an opportunity to comment by interested parties.

Important Considerations Regarding Section 252(i) and Rule 809

For the reasons set forth above, the Commission should not act to grant the relief requested in this petition. However, to the extent this Commission does consider issuing new guidelines and rules, in an appropriate proceeding, interpreting section 252(i), it is important for the Commission to consider the limitations under which a CLEC may select provisions from a newly approved interconnection agreement.

The FCC placed restrictions on the pick and choose rules that reflect the fact that provisions within agreements may be interrelated with others. The FCC also premised its limitations upon the dynamic and changing nature of telecommunications markets, networks, costs, prices, and products. Thus, the FCC rules place reasonable limitations upon the time in which a requesting CLEC may make an election under section 252(i), as well as the provisions that may be elected from another agreement.

The language in Rule 809 and the FCC's First Report and Order[2] clearly indicates that no carrier has free rein to unilaterally amend its agreement at any time if it believes that other provisions would work better for it. The rule itself reads as follows:

> **§ 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.**

[2] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996. CC Docket No. 96-98, First Report and Order (August 8, 1996).

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> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i. e., local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> (2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.
>
> (c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

Time frame for opting into an approved agreement

One of the important limitations placed upon opting into approved agreements is the time period within which a CLEC must make an election. The FCC recognized that a CLEC should not be granted a period of unlimited duration to pick and choose a provision from a newly approved interconnection agreement. The FCC included this requirement in subsection (c) of the rule, and stated:

> We agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the

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> pricing and network choices are likely to change over time, as several commenters have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.

First Report and Order, ¶ 1319. Accordingly, an interpretation of what constitutes a reasonable time period must include consideration of the factors of technical compatibility, allowing the CLEC to benefit from an approved agreement, and changes in pricing and product options.

Other factors to consider include the amount of time required to submit negotiated agreements to the Commission for approval, as well as the time necessary to implement the agreement. These time periods should be compared to the duration of the existing agreement and its expiration date, because it does not make sense to implement an interconnection agreement soon before the existing agreement expires.

The interconnection agreements currently negotiated by U S WEST typically contain a term of two years. U S WEST suggests that newly approved contracts and their provisions be made available for election under section 252(i) for a period of six months following Commission approval. This allows the requesting provider a period of eighteen months to submit the agreement to the Commission for approval and to implement the agreement before its existing agreement expires. Any shorter period would result in both parties expending considerable resources to implement the agreement, without being able to benefit from the chosen provisions before the agreement expires.

Similarly, if a term of less than one year remains in an agreement, it would not be reasonable for a provider to "opt-into" that agreement or any arrangement contained in that agreement. Most state commissions have treated "opted into" agreements as voluntarily negotiated agreements and therefore have utilized the ninety-day approval period. After approval,

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such an agreement or amendment would be effective for only nine months, which means that the parties would again expend unnecessary resources to implement the newly-elected provisions, and at the same time begin negotiations for a new contract.

In its First Report and Order, the FCC further clarified the circumstances under which a carrier may avail itself of the "pick and choose" provisions of the Act and the Rule. In paragraph 1316 of the First Report and Order, the FCC stated:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements . . . . This means that any requesting carrier may avail itself of more advantageous terms and conditions *subsequently* negotiated by any other carrier for the same individual interconnection, service, or element once the *subsequent* agreement is filed with, and approved by, the state commission. (Emphasis added.)

It is clear from this discussion that a carrier may only opt into terms and conditions which came into existence *after* it entered into its agreement with U S WEST. Once a CLEC executes an agreement, it should not be able to pick and choose from agreements that were available during the original negotiating process. Thus, after the execution of an agreement, a CLEC may pick and choose provisions only from subsequently approved agreements. Also, for administrative purposes, existing contracts should be amended to reflect provisions selected pursuant to section 252(i).

Importantly, a CLEC should not be able to extend the term of an existing agreement. Once the Commission has approved the duration of an interconnection agreement, a CLEC must not be able to opt into a duration provision of a newly approved agreement. Otherwise, the concerns of the FCC regarding changes in technology, pricing, product offerings, as well as the legal environment would be meaningless. A CLEC should not be able to repeatedly opt into new duration provisions

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at the expense of the ILEC when technology, prices, products, and the law are changing almost constantly.

Also, if a CLEC with an existing agreement selects a provision from a newly approved agreement with a shorter duration than the existing contract, then the shorter duration should apply for the existing contract. This furthers the interest of uniformity of administration within an agreement – it would be unworkable to comply with different termination periods for different provisions within the same contract.

Limitations upon providers under existing contracts for opting into newly approved provisions or agreements

A similar timing issue is the period before expiration of an existing contract during which a provider should not be able to opt into a newly approved provision to amend the existing agreement. The rationale and the equities are similar to those discussed in the preceding section. That is, the parties to an existing contract must begin negotiations for a new contract within approximately nine months before expiration of the existing contract. If a CLEC opts into a newly approved provision soon before the parties begin negotiation and implementation of a new contract, then the parties will expend considerable and unproductive resources implementing a new provision shortly before the contract is to expire. Therefore, considering the nine-month time period that is typically necessary to negotiate new contracts, U S WEST suggests that a provider not be permitted to amend its existing contract with a newly approved provision less than one year before the termination of the existing contract.

Although the FCC does not define how long a reasonable period of time is, U S WEST submits that its policy meets that requirement. Clearly, the FCC does not require that the agreements or the terms and conditions from the agreements be available for the entire term of the

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agreement -- if this is what the FCC had intended, it would have been easy enough to write that into the rule. Instead, the rule requires a reasonable period. The joint petitioners offer no guidance as to how one might determine a reasonable period. On the other hand, U S WEST's policy offers a generous amount of time in which to opt-in, while avoiding the impractical and inefficient result of having to implement a contract which is close to expiration.

Scope of the terms and conditions that may be selected under section 252(i)

Other important limitations on section 252(i) include the scope of the terms and provisions that a CLEC may elect. The FCC prohibits a CLEC from choosing a provision or a sentence from another agreement without also incurring the obligations of integrated and dependent provisions that are necessary components to the selected provision or sentence. These limitations are defined by three factors under the FCC rules: cost, technical feasibility, and the degree to which provisions are integrally related.

First, the FCC rules provide that an ILEC may prohibit a provider from picking a certain arrangement if the incumbent can show to a state commission that the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement. 47 C.F.R. § 51.809(b)(1). Second, the rules limit selection of particular services or elements only to the extent that the provision of such services or elements is technically feasible. Id. at § 51.809(b)(2).

Third, the FCC's First Report and Order elaborated upon the degree to which provisions may be related to or integrated with other provisions. It states as follows:

> [W]e conclude that the "same terms and conditions" that an incumbent LEC may insist upon shall relate solely to the individual interconnection, service, or element being requested under section 252(i). For instance, where an

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> incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops. Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought.

First Report and Order, ¶ 1315. Thus, if a CLEC selects a provision pursuant to section 252(i), the parties' negotiations should focus upon the extent to which the selected provision may be legitimately related to others in the agreement.

Sections of U S WEST's agreements incorporate these three factors by separating the agreement into sections that are wholly integrated within themselves. For example, the Resale section of U S WEST's interconnection agreement is a wholly integrated provision in terms of its definition, costs, prices, technical feasibility, and internal interrelationships. Similarly, U S WEST's section on interconnection is integrated by its definitions, prices, costs, and technical feasibility. Therefore, a CLEC should be able to elect individual sections of a U S WEST approved agreement, such as resale, interconnection, or unbundled network elements.

In accordance with the FCC rules, it is also important for this Commission to consider whether an approved interconnection agreement was the result of an arbitration, which in turn was premised upon the particular facts established at the arbitration.

Further, CLECs using section 252(i) must not be allowed to circumvent current law or previous determinations of the Commission. That is, U S WEST should not have to provide an arrangement if U S WEST has no such obligation under the law in effect at the date of the provider's request. And, a provider should not be able to "opt-into" a provision from another

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interconnection agreement if the Commission has previously determined that U S WEST had no obligation to provide the arrangement to the requesting provider.

Procedures

Pursuant to the FCC rules, U S WEST recommends that certain accelerated procedures apply to the processes under section 252(i). As stated by the FCC:

> We further conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis.

First Report and Order, ¶ 1321. Similarly, U S WEST recommends that, if disputes arise between the parties regarding the application of section 252(i), that the parties invoke the dispute resolution provisions of their agreements, on an expedited basis if required. U S WEST does not agree that a CLEC should always be permitted to use the provisions of WAC 480-09-530 to enforce an attempted election under 252(i). First, as described above, the joint petitioners are seeking to modify the time lines and other requirements of this rule without following the proper procedures required to amend a rule. Further, 480-09-530 only applies to enforcement of existing interconnection agreements, and cannot be used to resolve certain disputes, such as whether a carrier with no interconnection agreement is entitled to opt into a particular existing agreement.

In conclusion, U S WEST submits that a declaratory order or an interpretive and policy statement should not be issued as requested by joint petitioners, and that no expedited timetable should be established for resolution of disputes as requested in the petition. The petition should therefore be denied. The Commission may wish to consider whether a rulemaking proceeding on these issues is necessary or appropriate.

Respectfully submitted this 16th day of July, 1999.

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